IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 617 of 2003

with

SPECIAL CIVIL APPLICATION No 666 of 2003

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VALSAD DISTRICT CENTRAL CO-OPERATIVE BANK LTD.

Versus

KRUSHNALAL MANILAL VASHI

Appearance:

1. Special Civil Application No. 617 of 2003
   MR DG CHAUHAN for Petitioner
   MR GM JOSHI for Respondent
2. Special Civil Application No. 666 of 2003
   MR DG CHAUHAN for Petitioner
   MR GM JOSHI for Respondent

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 22/07/2004

ORAL JUDGEMENT

1.0 The above Special Civil Application No.617/2003 has been filed challenging the order dated 29.10.2002 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 and to declare that the respondent is not entitled for interest as awarded. In Special Civil Application No.666/2003 the petitioner has prayed to quash the order dated 22.10.2002 passed by the Appellate Authority under the Payment of Gratuity Act, 1972, whereby he confirmed the order passed by the Controlling Authority, Vadodara who directed the petitioner to pay a sum of Rs.2,30,751/- towards the payment of gratuity with 15% compound interest per annum from the date of receipt of the Order.

2.0 The respondent was working as an Agent in the Pardi Branch of the petitioner Bank. It is alleged that he had committed misappropriation of funds of the bank to the tune of Rs.13,83,000/-. Therefore, on 17.7.1980 the respondent was suspended and he was served with chargesheet pending departmental enquiry. A criminal case was also filed against the respondent before the Additional Chief Judicial Magistrate at Valsad.

2.1 During the pendency of the criminal proceedings and Departmental Inquiry, the respondent retired from service on 26th December 1997 on his attaining the age of superannuation. However, because of the alleged commission of misappropriation the petitioner bank forfeited the amount of gratuity payable to the respondent.

2.2 After superannuation the respondent filed Application No.5/99 before the Controlling Authority under the Payment of Gratuity Act. The Controlling Authority allowed the said application and directed the Petitioner Bank to make payment of Rs.2,30,880/- towards the amount of gratuity along with 12% interest per annum payable from 27th December 1997 to the respondent.

2.3 The petitioner therefore filed Review Application No.24/99 before the Appellate Authority who allowed the said application. Against the said order the respondent preferred Appeal No.6/2000 before the Appellate Authority who by order dated 13.9.2000 allowed the appeal and directed the petitioner bank to pay the amount of Rs.2,30,880/-. The petitioner bank challenged the said order by way of Special Civil Application No.11481/2000 and this Court by order dated 25.4.2001 set aside the order dated 13.9.2000 on the ground that the respondent

had already moved an application before the appropriate Controlling Authority.

2.3 In the meanwhile the Additional Chief Judicial Magistrate, Valsad vide his judgement and order dated 20th November 1999 convicted and sentenced the petitioner for rigorous imprisonment for a period of five years and imposed a fine of Rs.10000/- in default to undergo further imprisonment for a period of six months. The respondent preferred Criminal Appeal No.74/99 before the Additional Sessions Judge, Valsad at Navsari. The learned Judge suspended the order of conviction but did not grant stay against imposition of fine.

2.4 On 20th November 1999 the petitioner issued a show-cause notice to the respondent and after considering his reply dated 7.1.2000 by order dated 15.1.2000 the respondent was dismissed from service with effect from 17th July 1980.

2.5 The respondent preferred an application before the Controlling Authority (Central) claiming the amount of gratuity. The Controlling authority, by order dated 16.1.2002 directed the petitioner to pay a sum of Rs.2,30,751 towards the payment of gratuity along with 15% compound interest per annum from the date of receipt of the Order. The petitioner preferred an appeal against the said order being Appeal Case No.AH/48/(2)/2002. The respondent also filed Appeal Case No.AH/48/(4)2002 claiming interest at the rate of 18% from the date of retirement i.e. 26.12.1997 till realisation of the amount of Rs.2,30,751/-.

2.6 The Appellate Committee authority the appeal of the petitioner and partly allowed the appeal of the respondent by order dated 29.10.2002 and partially modified the order passed by the Controlling Authority, Baroda by directing the petitioner Bank to pay a sum of Rs.99,760/- towards interest for the period from the date of retirement i.e. 27.12.1997 to the date of filing the appeal i.e. 24.4.2002 on gratuity amount of Rs.2,39,751 within 30 days.

3.0 It is against the aforesaid orders the above petitions have been filed.

4.0 Mr D.G. Chauhan, learned cousnel for the petitioner submitted that under sub-section (6) of section 4 of the Payment of Gratuity Act, 1972, the petitioner bank has right to forfeit the amount of gratuity. Subsection (6) of section 4 of the Act reads

as under:

"(6). Notwithstanding anything contained in sub-section (1):

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging tot he employer, shall be forfeited tot he extent of the damage or loss so caused.

(b) The gratuity payable to an employee [may be wholly or partially forfeited].

[i] if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

[ii] if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of of his employment."

In the alternative Mr. Chauhan submitted that even under sub-rule (5) of Rule 14 of the Valsad District Central Coop. Bank Ltd., the Bank is entitled to forfeit the gratuity for misconduct provided he is removed from service.

5.1 In the present case the respondent workman was suspended on 17th July 1980. Thereafter he had attained the age of superannuation on 27th December 1997. Therefore, the right to get gratuity was from 1st January 1998. On plain reading of sub-clause (6) it is very clear that the right of forfeiture of the employer is only if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude.

5.2 In the present case the alleged termination is passed on 15th January 2000 after the conviction order dated 22nd November 1999. Therefore, there is no

allegation of riotous or disorderly conduct or any other act of violence on his part causing damage or loss to the bank. To take the advantage of the word "termination" the order of termination was passed on 15th January 2000 with effect from 17th January 1980. However, it is pertinent to note that after 28th December 1997 the respondent was not the employee of the petitioner bank and therefore giving retrospective effect is misconceived.

5.3 Apart from that, from the date of reaching the age of superannuation the respondent employee was not convicted. Therefore, both the authority has considered the law declared by the Apex Court and the contention of the petitioner bank that services are "terminated" is misconceived inasmuch as the termination order is of 15th January 2000. Before that period the respondent employee had attained the age of superannuation. Therefore, subsection (6) of section 4 of the Act will not apply and will not help the petitioner.

6.0 Mr. Chauhan for the petitioner has relied upon a decision of the Supreme Court in the case of Tournamulla Estate Vs. Workmen, reported in AIR 1973 SC 2344. He has placed reliance upon the ratio that if the workman is guilty of serious misconduct of the third category, then his gratuity can be forfeited. The third category as mentioned in the said judgement is as under:

> "(3) serious misconduct such as acts of violence against the management or other employees or riotous or disorderly behaviour in or near the place of employment, which, though not directly causing damage, is conducive to grave discipline."

However, Mr. Chauhan lost sight of the ratio of the Supreme Court judgement where it has been categorically held that the first category will not involve any forfeiture, but the second may involve forfeiture directly in consequence of the misconduct. In the present case, it might fall in the second category, but the exact amount of loss is not ascertained. It was submitted by Mr. Chauhan that for that appropriate civil proceedings are initiated against the workman. In my opinion, unless the amount is ascertained, the gratuity cannot be withheld.

6.1 It is well settled principle that one cannot be judge of his own cause unless competent court passes an appropriate decree or the authority establishes the

liability of the employee. Merely on their own assessment the employer cannot arbitrarily withhold the gratuity. If such rights are given, then it is quite natural that all the employers will take shelter of law and they will try to avoid payment of gratuity. That is not the intention of the Legislature. This being a labour welfare legislation, the interpretation, if it is required to be made, the same should be in favour of the employee. Therefore, I do not see any merit in the contention of Mr. Chauhan.

7.0 As against the above submissions, Mr. Gautam Joshi for the respondent workman submitted that on the date of his retirement there was no termination order and therefore the aforesaid sub-section (6) would not apply to the facts of the case.

7.1 He relied upon a decision in the case of Bhagirathi Jena Vs. Board of Directors, O.S.F.C., reported in (1999)3 SCC 666 wherein it has been held that no specific provision exists in the Staff Regulation 1975 and there was also no provision for conducting disciplinary inquiry after the retirement nor is there any provision stating that in case of misconduct deduction could be made from the retirement benefits. In the instant case the appellant has retired from service and therefore there was no authority vested in the employer for continuing the departmental inquiry even for the purpose of reduction in retirement benefits payable to him. In absence of such authority it must be held that the impugned order is illegal and bad.

7.2 In the instant case no departmental inquiry was conducted. Merely on alleged order of dismissal or termination, that too after the employee has reached the age of superannuation, the petitioner is not entitled to forfeit the gratuity amount. The ratio laid down in the case of Bhagirathi Jena (supra) is squarely applicable to the facts of the present case. In view of the fact that if the employer is not entitled to conduct the inquiry, then it is not open for the employer to impose penalty after retirement without inquiry.

7.3 Mr. Joshi has also relied upon a decision in the case of GSRTC Vs. D.M. Vaidya, reported in 2003 Vol.44(3) GLR page 2485 wherein it has been specifically held that where an employee is allowed to retire without any reservation, the employee is entitled to withdraw the gratuity. In the present case the petitioner has allowed the respondent employee to retire from service on his

reaching the superannuation. Under the circumstances the petitioner Bank has no power to withhold the amount of gratuity. In view of the law laid down in the aforesaid judgement the respondent employee is entitled to get gratuity.

8.0 I have gone through the impugned orders and also the relevant record of the case. The view taken by both the lower authorities is in consonance with the law laid down by the Supreme Court and therefore no interference is called for under Article 227 of the Constitution of India.

9.0 Mr. Chauhan for the petitioner has tried to establish that even under the Rules if there is a dismissal the employee is not entitled for the gratuity. However, the fact remains that termination order could not have been passed before the conviction order without departmental inquiry. In the present case conviction is after the age of superannuation and therefore legally the respondent employee could not have been dismissed or his services could not have been terminated on the date of superannuation. Therefore, provisions of the rules or the Act are not attracted. In that view of the matter, on the date of superannuation the right of the employee was crystalised and therefore the employer cannot withhold the gratuity on the ground of conviction.

10.0 As regards the interest part, in view of the provisions of section 7(3A) of the Act, the competent authority has committed an error in granting compound interest at the rate of 15%. The order should have been for simple interest which was prevailing as on 1st January 1998.

11.1 In view of the foregoing discussion, there are no merits in the Special Civil Application No.666/2003. The same is accordingly rejected. Rule is discharged with no order as to costs.

11.2 In Special Civil Application No.617/2003 the impugned order dated 29.10.2002 passed by the Appellate Authority is modified to the extent that the respondent employee shall be entitled to simple interest at the prevailing rate as on 1.1.1998. The said petition is, therefore, partly allowed. Rule is made absolute to the aforesaid extent with no order as to costs. The competent authority shall calculate the amount due and payable to the respondent employee as directed hereinabove and the excess amount, if any shall be refunded to the petitioner Bank.

[K.S. JHAVERI, J.]

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